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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

TROY EUGENE KING,

Defendant and Appellant.

C058671

(Super. Ct. No. SF068915A)

Defendant Troy Eugene King appeals from the trial court's order denying his petition for writ of error *coram nobis*, in which he sought to vacate a conviction now over 10 years old. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The record before us contains only the clerk's transcript of the proceedings in defendant's 1997 conviction for possession of marijuana for sale, the reporter's transcript of defendant's change of plea and sentencing, defendant's *coram nobis* petition and supporting declaration, and the trial court's ruling denying the petition. The San Joaquin County Superior Court has

informed defendant and this court that because of the case's age, the court reporter's notes were destroyed and no other transcripts can be prepared.

The 1997 Conviction

On August 23, 1996, defendant was charged in San Joaquin County Superior Court (then Municipal Court) with possessing marijuana for sale (count 1; Health & Saf. Code, § 11359) and resisting, delaying, or obstructing a public officer (count 2; Pen. Code, § 148). On the same date, defendant was arraigned and pled not guilty; the public defender was appointed to represent him.

On September 6, 1996, defendant withdrew his plea, entered a plea of guilty to count 1, and admitted violating probation on a prior felony, on the understanding that he would receive a sentence of either 16 months in state prison or five years eight months in state prison with execution suspended on a grant of probation, and that count 2 and nine trailing misdemeanors or infractions would be dismissed. After defendant waived his rights and denied that he had entered into the plea due to any threats or promises, the trial court found that defendant was entering the plea knowingly and voluntarily. The court accepted the plea and dismissed count 2 and the trailing matters.

On February 4, 1997, the trial court sentenced defendant to five years and eight months in state prison (the additional eight months stemming from a misdemeanor committed in November 1996), then suspended sentence and granted five years' probation with 180 days in county jail.

Defendant's Petition for Writ of Error Coram Nobis

Defendant's petition, filed in San Joaquin County Superior Court on November 21, 2007, alleges:

Defendant agreed to waive jury trial and enter a plea in the 1996 case because his attorney's false representations overcame his free will and judgment. His attorney told him that if he agreed to work with the arresting officers by setting up a drug deal and becoming an informant, he would not do any prison time and his case would be dropped. After "insistent pressures and promises" by his attorney and others, defendant agreed to this arrangement and performed his part of the bargain. His attorney never told him that the resulting conviction could still be used against him as a prior conviction in any later case (an omission constituting ineffective assistance of counsel). He did not learn this fact until he was advised on or about December 2006 that the 1997 conviction "was not 'dropped' and . . . could be used to enhance his sentence." No appeal was taken from the judgment, the time for appeal had passed, and defendant had no plain, speedy, and adequate remedy available except a writ of error *coram nobis*.

In his supporting declaration, defendant averred in part:

"I was prepared to go to jury trial in the case until my appointed counsel informed me that the district attorney, Mr. Vlavianos[,] offered me a deal. In exchange for my guilty or no contest plea, I would have [to] cooperate with Officer Gary Fasselli and a narcotics officer called 'Big Bird' in setting up a buy. In exchange, I would receive no time in

prison, the resisting arrest charge would be dismissed, I would have to attend a treatment program and ultimately the charges would be dropped. Mr. Fox [appointed counsel] encouraged me to accept the deal.

"I later met with the officers as part of the agreement. They also encouraged me to follow through with the above stated deal. I followed their instructions and became an informant as instructed by the officers.

"I believed all was going according to plan as I entered the guilty plea. It was not until I was subsequently arrested in Federal court and was informed that the guilty plea that I had entered in this case had in fact become a conviction that could be used as [a] prior conviction to enhance my sentence . . . that I realized that this case had not been 'dropped' as promised."

The People did not file any opposition.

The Trial Court's Ruling

On February 8, 2008, the trial court issued an order denying the petition on the following grounds:

"'[I]t is well settled in California that a showing of diligence is a prerequisite to the availability of relief by writ of error *coram nobis*. One who applies for such a writ must show that the "facts" upon which he relies were not known to him, and could not, in the exercise of due diligence, have been discovered by him at any earlier time than the time of his application. Otherwise, he has stated no grounds for relief.' (*People v. Fritz* (1956) 140 C[al].A[pp].2d 618, 621.)

"The court notes that this petition is requesting that a conviction which is over ten years old be vacated. According to Petitioner, he was not made aware of the circumstances leading to this petition until December of 2006. Petitioner, however, waited almost a year before bringing his petition. This delay undermines Petitioner's request for relief.

"More importantly, however, '[t]he function of the writ of error *coram nobis* is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if it had been made known to the trial court, and which, through no negligence or fault of the defendant, was not brought forward before the rendition of judgment.' (*People v. Tannatt* (1960) 181 C[al].A[pp].2d 262, 267.)

"The record indicates that at his 'Change of Plea' hearing, no promise was made to drop or dismiss the conviction to which Petitioner pled; that is, possession of marijuana for sale. Instead, Petitioner agreed to plead guilty to the possession and in exchange, the resisting arrest charge as well as nine other files/matters were dismissed as part of the bargain. See Change of Plea transcript 15:2-8. Petitioner was specifically asked by the court whether any threats or other promises were made in order to have Petitioner plead guilty to the possession charge. Petitioner answered, 'No, sir' to each inquiry. See Change of Plea transcript 13:22-28, 14:1. Accordingly, there is no factual basis upon which judgment should be vacated or this petition for writ of *coram nobis* should be granted."

DISCUSSION

Defendant contends: (1) "The destruction of [defendant]'s court record engendered error that violated [defendant]'s fundamental and substantial rights." (2) "The court should review [defendant]'s claim concerning the destruction of court records even though counsel failed to articulate it [in] the lower court." (3) "The lower court abused its discretion by ignoring both the supported arguments provided by [defendant]'s attorney and the relevant facts provided by [defendant] in his supporting declaration." (4) "The lower court abused its discretion by not recognizing that much of the bases for [defendant]'s claims are [sic] outside the record." (5) "The lower court abused its discretion by basing its ruling on an unreasonable application of law with regard to the facts of [defendant]'s case." (Capitalization omitted.) We are not persuaded.

Standard of Review

"A writ of error *coram nobis* is reviewed under the standard of abuse of discretion. [Citation.]' [Citation.] 'A writ of *coram nobis* permits the court which rendered judgment "to reconsider it and give relief from errors of fact." [Citation.] The writ will properly issue only when the petitioner can establish three elements: (1) that some fact existed which, without his fault or negligence, was not presented to the court at the trial and which would have prevented the rendition of the judgment; (2) that the new evidence does not go to the merits of the issues of fact

determined at trial; and (3) that he did not know nor could he have, with due diligence, discovered the facts upon which he relies any sooner than the point at which he petitions for the writ. [Citations.]’ [Citation.] “The writ lies to correct only errors of fact as distinguished from errors of law. [Citation.]” [Citation.]’ [Citation.]” (*People v. McElwee* (2005) 128 Cal.App.4th 1348, 1352 (*McElwee*).)

Defendant asserts that the deferential abuse of discretion standard is inappropriate here, for two reasons: (1) We should exercise independent judgment “with regard to pure questions of law and in some circumstances, mixed questions of law and fact[.]” (2) Defendant’s claims implicate his federal constitutional rights. However, defendant does not identify any pure questions of law or mixed questions of law and fact presented here, and all petitions for writ of error *coram nobis* necessarily implicate the federal constitutional right to be free of wrongful conviction and imprisonment. Thus defendant has not shown grounds for applying de novo review.

Analysis

The trial court’s ruling was a proper exercise of its discretion. We need not decide whether the court’s first ground (lack of due diligence in filing the petition) was correct, because the court’s second ground was sufficient: defendant failed to show facts justifying relief. When he pled guilty to possession of marijuana for sale he averred in open court that no promise had induced his change of plea, and the sentencing court proceeded according to the plea agreement as shown in the

record. Nothing before the trial court on the petition for writ of error *coram nobis* supported defendant's contrary allegations, which the court could properly disbelieve if uncorroborated.¹

(*McElwee, supra*, 128 Cal.App.4th at p. 1352.)

The fact that defendant proffered a declaration does not alter the analysis. Triers of fact routinely reject sworn testimony as incredible. Defendant's declaration asserted that a facially routine plea bargain concealed a secret agreement among the prosecutor, the police, and the public defender which contradicted the express terms of the plea bargain, and which was more favorable to defendant than the already generous plea bargain on its face. Lacking independent corroboration, this claim was not credible.

As noted, defendant asserts prejudice from the destruction of the court reporter's notes and the trial court's refusal to acknowledge that defendant's claims rested on matters outside the record. The short answer is that where the existing record does not help a defendant, his remedy, if any, must come by way of habeas corpus.²

In any event, defendant fails to explain how the destruction of the court reporter's notes could have prejudiced

¹ Defendant's appellate "statement of facts" relies wholly on these unsupported allegations, which he improperly characterizes as facts.

² Defendant states that he has filed a petition for habeas corpus which is now pending in the superior court.

him. He speculates that the transcript of his arraignment "could demonstrate whether or not [he] understood the charges facing him and the exact charges . . . involved," while the transcript of his initial not guilty plea "would demonstrate whether he was advised by counsel." But even if this were so, it would establish nothing germane to his *coram nobis* petition, which does not allege that his conviction must be vacated because he was unadvised or misadvised at the earliest stage of the proceedings.³

DISPOSITION

The judgment (order denying petition for writ of error *coram nobis*) is affirmed.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

NICHOLSON, J.

³ Defendant also faults his trial counsel on the *coram nobis* petition for failing to move to augment the record or to seek a settled statement. But he does not support these assertions by record citation; therefore we disregard them. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) In any event, defendant does not give any reason to think such efforts would have been productive.